1998

Catherine L. Durborow v. IHC Hospital, Inc. Cottonwood Hospital Medical Center : Brief in Opposition to Certiorari

Utah Court of Appeals

Samuel King, David J. Friel; Attorneys for Plaintiff.
Charles W. Dahlquist II, Merrill F. Nelson, David J. Hardy; Kirton and McConkie; Attorneys for Defendant.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

CATHERINE L. DURBOROW, Plaintiff-Petitioner, vs. IHC HOSPITAL, INC. COTTONWOOD HOSPITAL MEDICAL CENTER, Defendant-Repondent.	Case No. 981849-SC Priority No. 15

RESPONDENT'S BRIEF OPPOSING WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the Court of Appeals of the State of Utah

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INTRODUCTORY STATEMENT

Plaintiff's Petition for Writ of Certiorari is frivolous. As phrased, the questions presented are prolix, repetitive, argumentative, and incomprehensible, in violation of Rule 49(a)(4), Utah R. App. P. The petition fails to set forth the statutory basis for jurisdiction of this Court, as required by Rule 49(a)(6)(D). The statements of the case and facts contain no specific citations to the record or court of appeals opinion, as required by Rule 49(a)(8). And the argument contains no concise statement of the "special and important reasons" for issuing the writ, as required by Rule 49(a)(9). The plaintiff's failure "to present with accuracy, brevity, and clarity" any justification for granting the writ is "a sufficient reason for denying the petition." Rule 49(e). [1]

QUESTION PRESENTED FOR REVIEW

Whether the court of appeals correctly held the hospital not liable for plaintiff's fall on an outside doormat because the sudden lifting of the edge of the mat by a gust of wind was a temporary condition of which the hospital had no prior notice.

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[1] Plaintiff claims to have filed a "corrected version" of the petition on January 6, 1999, purportedly for the sole purpose of correcting spelling errors. However, a comparison of the two versions shows substantial alterations of wording (none of which corrects the deficiencies identified above). In addition, the revised petition exceeds the 20-page limit, when the Questions Presented section and other matters paginated with the tables on pages *iii* and *iv* are paginated with the body of the petition, as they should be. More importantly, the rules make no provision for filing a "corrected version" of a petition *after the time for filing has expired.* Accordingly, in the absence of an order authorizing a late filing, the defendant disregards the second petition and responds to the original petition, filed December 28, 1998.

OPINION OF COURT OF APPEALS

The Memorandum Decision of the court of appeals, affirming summary judgment for the hospital, was not issued for official publication, but is set forth in the Appendix. ("Mem. Dec.," App. 1.)

CONTROLLING AUTHORITY

Consideration of plaintiff's petition is governed by Rule 46(a), Utah R. App. P., which sets forth the standards for granting review by writ of certiorari (App. 12.) The underlying question presented is governed purely by case law discussed herein.

STATEMENT OF THE CASE

This is a premises liability action arising out of plaintiff's fall on a doormat outside the entrance to the defendant hospital. Plaintiff fell when a sudden gust of wind allegedly blew the edge of the mat into her legs. (R. 1, 48; Mem. Dec. 1.) The hospital moved for summary judgment on the basis that the partially wind-blown mat was a temporary condition of which it had no prior notice. (R. 91-100.) Plaintiff filed a cross-motion for summary judgment, identifying no material disputed fact. (R. 130-46; Mem. Dec. 2.) The district court granted the hospital's motion on the grounds asserted and denied plaintiff's cross-motion. (R. 294, App. 5.) After full briefing, the court of appeals affirmed in an unanimous unpublished memorandum decision. (Mem. Dec. 2-3, App. 2-3.) The court of appeals also denied plaintiff's petition for rehearing. (App. 4.) Plaintiff subsequently filed the petition for writ of certiorari in this Court.

STATEMENT OF FACTS

On a windy day in March 1995, around midday, plaintiff went to Cottonwood Hospital to visit her doctor. (R. 180.) Plaintiff testified that as she walked toward the hospital entrance and stepped onto the outside doormat, "the wind blew part of it up and it caused [her] to fall." (*Id.*, ¶ 5.)

Hospital employees responded to the scene and helped plaintiff into the hospital. (R. 55-56.) Plaintiff claims permanent injuries resulting from the fall, but the record contains no evidence of such claims. In any event, plaintiff's claimed injuries are not material to the legal issue of liability.

The doormat on which plaintiff fell was a standard commercial-grade mat, four feet by thirteen feet, made of indoor/outdoor carpet with rubberized backing to avoid slippage. It was manufactured by the 3-M Company for both indoor and outdoor use. For purposes of both sanitation and safety, the mat was designed and intended to be of sufficient length to allow enough steps on the mat for patrons' shoes to be cleaned of dirt and water before entering the hospital. The vendor demonstrated the stability of the mat by placing blowers at its edge and running wheelchairs over it to show that it would not blow or slide. This standard mat is in common use at hospitals and commercial buildings around the area. The doormat at issue was sold to the hospital in 1990, with a projected useful life of eight to ten years. During the five years it was in use prior to plaintiff's fall, the hospital conducted regular monthly inspections of the mat and surrounding premises to look for damaged carpet or tile or any dangerous condition that could cause

an accident. No such danger with the mat was ever observed or reported. (Warren Dep., R. 160-64; First Anderson Aff't, R. 28-29; Oral Findings, R. 251-52; App. 9-10.)

During the five years the subject mat was in use prior to plaintiff's fall, the hospital never received any information, report, or notice that the mat had ever lifted in the wind, or that any person had ever fallen or tripped or had any other accident on the mat. (First Anderson Aff't, R. 29; Second Anderson Aff't, R. 222-23; Stout Dep., R. 150; Anderson Dep., R. 155-56; Warren Dep., R. 164.) "Plaintiff concedes Defendant had no actual notice" of any danger. (Pet. 8.) [2]

Plaintiff sued the hospital, alleging negligence in selection and use of the doormat. (R. 1-2.) The hospital moved for summary judgment on the basis that the alleged unsafe condition of the mat created by the sudden gust of wind was a temporary condition of which the hospital had no prior notice. (R. 91-100.) Plaintiff filed a cross-motion for summary judgment, identifying no material issue of fact. (R. 130-46.) The district court granted the hospital's motion on the grounds asserted and denied plaintiff's motion. (Order, R. 294-95, App. 5; Oral Findings, R. 253, App. 8.) The court of appeals affirmed:

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[2] Plaintiff asserts that hospital personnel recognized the mat had become too limber to be safe. (Pet. 1.) However, the assertion is untrue, and plaintiff cites no support for it. No one from the hospital testified that the mat was unsafe, or that they knew the mat was unsafe, prior to plaintiff's fall. Moreover, evidence of subsequent remedial measures is not admissible to prove negligence. Rule 407, Utah R. Evid.

> Because we agree with the trial court's determination that a wind blown mat is a temporary condition we also concur in its determination that appellant has failed to establish the Hospital's liability under that theory. It is undisputed that the Hospital did not have actual notice that the mat had or would flip in the wind. Furthermore, appellant has offered no evidence to show that the Hospital had constructive notice of this condition. [Mem. Dec., App. 3.]

The court of appeals denied plaintiff's petition for rehearing (App. 4), and plaintiff now seeks review in this Court.

ARGUMENT

THE COURT OF APPEALS DECISION IS CONSISTENT WITH CLEARLY ESTABLISHED UTAH CASE LAW; ACCORDINGLY, THERE IS NO "SPECIAL AND IMPORTANT" REASON FOR THIS COURT TO GRANT REVIEW.

A. Legal Principles and Analytical Framework.

Utah law governing premises liability for a slip or trip and fall is well established. As reaffirmed in this Court's most recent case of *Schnuphase v. Storehouse Markets*, 918 P.2d 476, 478 (Utah 1996), affirming summary judgment for the store owner, a property owner "is not a guarantor that his business invitees will not slip and fall," but is charged only with a duty of reasonable care. Stated otherwise, "property owners are not insurers of the safety of those who come upon their property, even though they are business invitees." *Id. See also Silcox v. Skaggs Alpha Beta, Inc.*, 814 P.2d 623, 624 (Utah App. 1991); *Martin v. Safeway Stores Inc.*, 565 P.2d 1139, 1140 (Utah 1977) (affirming directed verdict for store owner).

This Court has identified two classes of negligence cases in the slip-and-fall context. In the first class, the property owner "must have either actual or constructive knowledge of the hazardous condition." *Schnuphase, supra*, at 478. This class "involves some unsafe condition of a *temporary* nature, such as a slippery substance on the floor." *Id.* In such cases, the owner cannot be held liable for a resulting injury unless: (A) the owner had "either actual knowledge" of the condition, "or constructive knowledge because the condition had existed long enough that he should have discovered it;" and (B) "after such knowledge, sufficient time elapsed that in the exercise of reasonable care he should have remedied it." *Id.* In the second class of cases, the property owner must be shown to have "created the hazardous condition." *Id.* The second class "involves some unsafe condition of a *permanent* nature," such as the structure of a building or stairway, or in equipment or machinery, or in the manner of use for which the owner is responsible. In such cases, "where the defendant either created the condition, or is responsible for it, he is deemed to know of the condition; and no further proof of notice is necessary." *Id.* However, the plaintiff must "provide evidence of the foreseeability of an inherently dangerous condition." *Id.* at 479. *See also Allen v. Federated Dairy Farms*, 538 P.2d 175, 176 (Utah 1975).

The case of *Martin v. Safeway Stores Inc., supra*, which is the closest case factually to the present case, illustrates application of the class-one analysis. There, the plaintiff slipped and fell on a weather-caused patch of ice on a sidewalk leading to the store entrance. The ice had formed after the removal of fallen snow. Recognizing the

temporary nature of the icy spot, this Court affirmed a directed verdict for the store because its employees had no notice of the danger and could not reasonably be expected to prevent all weather-related risks on the outdoor sidewalk entry. 565 P.2d at 1140-41. The Court reasoned that owners of buildings with public access "are not insurers against all forms of accidents" and, therefore, have no duty "to mop the sidewalk dry or take other steps necessary to prevent the accumulation of moisture on the sidewalk that might freeze and create an icy condition." *Id.* at 1141.

Other cases demonstrate the clear dichotomy between the two categories of cases. Class-one cases focus on the temporary nature of the dangerous condition and are distinguishable from structural or inherent dangers. *See, e.g., Schnuphase v. Storehouse Markets, supra* (ice cream dropped by a customer; summary judgment for the store); *Allen v. Federated Dairy Farms, supra* (cottage cheese sample dropped by a customer; summary judgment for the store); *Long v. Smith Food King Store*, 531 P.2d 360 (Utah 1973) (pumpkin pie sample dropped on floor; summary judgment for the store); *Koer v. Mayfair Markets*, 431 P.2d 566 (Utah 1967) (grape dropped on floor; judgment NOV for the store); *Hampton v. Rowley Builder's Supply*, 350 P.2d 151 (Utah 1960) (slip on small rock on store steps; verdict for the store). By contrast, cases involving a danger that is permanent or structural or that is inherent in the owner's chosen method of operation fall into class two. *See, e.g., De Weese v. J.C. Penney Co.*, 297 P.2d 898 (Utah 1956) (inclined terrazo entryway that becomes slippery in the rain); *Canfield v. Albertsons, Inc.*, 841 P.2d 1224 (Utah App. 1992) (self-help lettuce display in which customers are

expected to remove and drop outer leaves to the floor). Accordingly, the lower courts in this case correctly applied the class-one analysis.

B. The Present Case Fits the Class-one Category.

As the two lower courts held, this case falls into the first class of slip-and-fall cases because the unsafe condition that caused plaintiff's fall was the sudden and temporary lifting of the edge of the doormat by a gust of wind. (Mem. Dec. at 2, App. 2; Dist. Ct. Oral Findings, App. 9-10.) The hospital did not create a dangerous condition merely by placing the mat outside its entry. In fact, placement of outside mats is expected, and possibly even required, as a risk management precaution to prevent dirt and water from being tracked inside the hospital. The mat itself was not dangerous in its typical flat position; it was used as designed and intended. Rather, the mat became temporarily dangerous only when a gust of wind suddenly lifted its edge just as plaintiff stepped onto it. The mat resumed its innocuous flat position when the wind subsided. There is no evidence that the mat had ever been lifted or flipped by the wind at any time prior to plaintiff's fall. Moreover, because the wind flipped up the mat just as plaintiff stepped onto it, the hospital obviously had no time to remove the danger prior to her fall. (Mem. Dec. at 2, App. 2.) As with the entry sidewalk in *Martin, supra*, the mat was not permanently or structurally unsafe; rather, it was rendered temporarily unsafe by the weather. Like the store in *Martin*, the hospital cannot reasonably be expected to eliminate all risk of weather-related hazards on its outside walkways, particularly a temporary hazard of which it had no prior notice. As the court of appeals concluded, this

is a class-one case because "[a] wind blown mat is more akin to a slippery substance on the floor" than to any permanent or structural condition. (*Id.*)

Under the class-one analysis, the hospital is entitled to judgment as a matter of law. Plaintiff concedes that the hospital had no actual notice of the danger. (Pet. 3, 8.) Moreover, the hospital could not possibly have had constructive notice of the danger because the danger existed only momentarily, with *no time* to discover and remedy it prior to plaintiff's fall. *See Schnuphase, supra*, 918 P.2d at 478. (Mem. Dec. at 3; App. 3.) Therefore, the court of appeals decision, affirming summary judgment for the hospital, is consistent with prior case law.[3]

C. Plaintiff's Claim of Conflicting Case Law Has No Merit.

Plaintiff argues that this Court should grant review because the court of appeals decision conflicts with prior decisions of this Court and the court of appeals. (Pet. 13.) However, plaintiff has failed to cite any conflicting case.

Plaintiff relies heavily on *Canfield v. Albertsons, Inc., supra*, decided by the court of appeals, arguing that it compels application of the class-two analysis in this case. (Pet. 5-7.) However, *Canfield* is easily distinguished and should be limited to its unique facts,

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[3] Under the facts of this case, the summary judgment could also be affirmed on the basis of superseding natural cause. For example, in *Morril v. Morril*, 142 A. 337 (N.J. 1928), the plaintiff was injured on the defendant's property when a door with a broken latch suddenly blew open and hit him in the eye. The court ruled for the defendant as a matter of law because the defendant had no duty to anticipate that the wind would blow the door open; accordingly, the proximate cause of the injury was not the broken latch or the failure to fix it, but the wind. The "innocuous act of ownership" cannot be held "to comprehend the unanticipated and unexpected blast of wind which it is conceded blew the door open." *Id.* at 340. "Where the alleged negligent act is separate from the injury done by the intervention of . . . the forces of nature, there can be no recovery." *Id.* at 341.

as this Court acknowledged in *Schnuphase, supra*. In *Canfield*, the plaintiff slipped on a lettuce leaf from a "farmer's pack display" in which lettuce was left in its original boxes, leaving the removal of damaged or wilted leaves to the customers, and resulting in discarded leaves on the floor around the display. 841 P.2d at 1225. The court held that class-two analysis applied because the store chose a method of operation by which it was expected that customers would remove and discard the outer lettuce leaves, thereby creating a reasonably foreseeable dangerous condition. *Id.* at 1226-27. Because the danger was reasonably foreseeable, the owner's notice of that danger was "not relevant"; rather, the issue was whether the owner "took reasonable precautions to protect customers against the dangerous condition it created." *Id.* at 1227.

By contrast, plaintiff presented no evidence in the present case that the hospital created a dangerous condition merely by placing a standard doormat outside its entry. Placement of outside doormats is a standard *safety precaution*. The mat enhances safety; it does not create inherent danger. The mat was rendered temporarily dangerous only by the sudden gust of wind that lifted its edge under plaintiff's step. The hospital no more created a danger by placing the doormat outside its door than did the store in *Martin* by pouring a concrete sidewalk that could become slippery in a snowstorm. It is not the mat or the sidewalk that is inherently dangerous, but the temporary forces of nature working on them.

As noted, this Court similarly distinguished *Canfield* in *Schnuphase*, rejecting application of class-two analysis to a slip on ice cream because merely allowing

customers to eat ice cream in the store does not create a foreseeable dangerous condition. "In a series of cases, this court has stated that foreseeability and inherent danger are key elements of a negligence action under the second theory of liability. . . . While we do not limit the second class of cases to only those operations which are permanently employed, inherent danger and foreseeability remain essential elements of the claim." 918 P.2d at 479. Because the plaintiff failed to present evidence of a foreseeable inherent danger, the store was exonerated as a matter of law. *Id.* "Not every accident that occurs gives rise to a cause of action upon which the party injured may recover damages from someone. Thousands of accidents occur every day for which no one is liable in damages, and often no one is to blame, not even the ones who are injured." *Id.* at 479-80, *quoting Martin*, *supra*, at 1142. Similarly, in the present case, plaintiff presented no evidence that placement of a doormat created a foreseeable inherent danger. Therefore, class-two analysis does not apply.[4]

Plaintiff also relies on *De Weese v. J.C. Penney Co., supra*, for the proposition that weather-related hazards should not be considered temporary, but should be addressed under the class-two analysis. (Pet. 9, 15.) However, the basis for owner

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[4] Plaintiff asserts that the doormat "had been unsafe for some time before Plaintiff fell," and that the hospital should have discovered or foreseen the danger. (Pet. 9, 16.) However, this is pure conjecture, not supported by any evidence. The only evidence shows that the hospital did conduct regular inspections and had no prior notice or indication of any such danger. The mere fact that the mat was more limber in the fifth year of its ten-year life than in the first does not prove that the mat had become inherently unsafe. Again, the danger here, if any, was not the mat in its natural state, but the mat as temporarily flipped up by the wind. As the district court expressly concluded, plaintiff presented no evidence to show constructive knowledge of any danger. (App. 11.) Plaintiff's position that a property owner has a duty to discover all possible risks of danger, on penalty of liability if undiscovered, amounts to strict liability, which this Court has rejected. *See Schnuphase, supra*, at 478

liability in *De Weese* was *not* that the *weather* condition was permanent, but that the *inclined terrazzo surface* in the store's entry "is part of the permanent structure of the building." 297 P.2d at 901. Because the evidence showed that the owner "knew of the characteristic of terrazzo to become slippery when wet," a jury question was presented on whether the owner took reasonable precautions to prevent the foreseeable danger. *Id.* By contrast, as noted above, no evidence was presented in the present case to show any prior knowledge or indication of danger in use of the doormat. Moreover, this Court has never held that weather-related hazards always require class-two analysis. *See Martin v. Safeway Stores, supra* (requiring notice of temporary icy spot on the sidewalk entrance to the store).

In summary, plaintiff has demonstrated no conflict between the court of appeals decision and any prior case. Rather, the analysis and result are absolutely consistent with the long line of appellate decisions in this state. The law is clear and well-established, and it was correctly applied in this case. Plaintiff has demonstrated no reason at all why this case should go through another layer of appeal, and certainly not any of the "special and important reasons" identified in Rule 46, Utah R. App. P. Therefore, the petition for writ of certiorari should be denied. [5]

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[5] Plaintiff's arguments in Points 3 and 4 do not merit a response. As is apparent from all the cases discussed herein, as well as established principles of negligence, plaintiff was not entitled to summary judgment simply by proving that she was injured as a result of an unsafe condition, and her cited cases stand for no such proposition. Moreover, plaintiff has cited no basis for the hospital to pay her legal fees. (Mem. Dec. at 3, App. 3.) Rather, it is the hospital that should be compensated for having to defend this meritless case in three different courts.

CONCLUSION

Based on the foregoing, this Court should deny the petition for writ of certiorari.

Respectfully submitted this 29th day of January, 1999.

KIRTON & McCONKIE

By: _____
Charles W. Dahlquist, II
Merrill F. Nelson
David J. Hardy
Attorneys for Defendant-Respondent

CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing **Respondent's Brief Opposing Writ of Certiorari** to be mailed through United States mail, postage prepaid, this 29th day of January, 1999, to the following:

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APPENDIX

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IN THE UTAH COURT OF APPEALS

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Catherine L. Durborow, Plaintiff and Appellant, v. IHC Hospital, Inc.; and Cottonwood Hospital Medical Center, Defendants and Appellees.	MEMORANDUM DECISION (Not For Official Publication) Case No. 971309-CA F I L E D (October 1, 1998)

Third District, Salt Lake Department
The Honorable Glenn A. Iwasaki

Attorneys: Samuel King and David J. Friel, Salt Lake City, for Appellant
Charles Dahlquist, Merrill F. Nelson, and David J. Hardy, Salt Lake City, for Appellees

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Before Judges Davis, Wilkins, and Greenwood.

WILKINS, Associate Presiding Judge:

Appellant Catherine L. Durborow brought suit against defendant IHC Hospital (Hospital) for personal injuries sustained as a result of a slip and fall in the entrance of its Cottonwood Hospital Medical Center. Durborow appeals the trial court's grant of summary judgment to IHC. We affirm.

STANDARD OF REVIEW

Summary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c). In determining whether the trial court properly granted summary judgment, we review the facts in the light most favorable to the losing party and give no deference to the trial court's legal conclusions. See Lister v. Utah Valley Community College, 881 P.2d 933, 937 (Utah Ct. App. 1994). Typically, claims involving negligence are not susceptible to summary judgment; however, where the "facts are undisputed and only one conclusion can be drawn from them," summary disposition is appropriate. Silcox v. Skaggs Alpha Beta, Inc., 814 P.2d 623, 624 (Utah Ct. App. 1991).

ANALYSIS

Appellant does not dispute the trial court's factual findings. Rather, appellant contests the legal conclusion that a wind blown mat is a temporary condition for purposes of analysis under our case law. Appellant argues that because the Hospital created the condition that injured her this case must be analyzed under the principles relating to an unsafe condition of a permanent nature. Also, appellant contests the trial court's determination that she is not entitled to fees and costs against the Hospital under Rule 11.

1. Negligence

Under Utah law there are two negligence theories by which a business owner can be held liable for injuries incurred by patrons. The first theory requires that the business owner have actual or constructive knowledge of a temporarily unsafe condition and sufficient time has passed after discovery of the condition so that the owner, in the exercise of reasonable care, should have remedied the condition. See Schmuphase v. Storehouse Markets, 918 P.2d 476, 478 (Utah 1996). The second theory involves an unsafe condition of a permanent nature which the business owner created or controls. See id. Under this theory the owner is deemed to be aware of the condition and therefore, notice is immaterial. See id.

Appellant contends that the trial court erred by finding that a wind blown mat is a temporary condition and therefore, misapplied the law. However, the uncontested facts are that the mat had been in the same place for five years without incident. Furthermore, there was no evidence presented that the mat had ever flipped in the wind before that day. The trial court determined that the mat only became unsafe momentarily when it was blown by wind strong enough to move it.

Although the wind is a permanent feature of the environment, it does not follow that the mat's unforseen yet potential susceptibility to the wind makes it a permanently unsafe condition. In other words, the dangerous condition arose only momentarily when the mat was lifted by the wind. In Allen v. Federated Dairy Farms, Inc., 538 P.2d 175 (Utah 1975) the Utah Supreme Court provided examples of what constitutes a permanent as opposed to a temporary unsafe condition. The court stated that a slippery substance on the floor is a condition of a temporary nature, whereas, the structure of a building or a stairway is a permanent condition. See id. at 176. A wind blown mat is more akin to a slippery substance on the floor because both the mat and the floor become dangerous only when coupled with another element. See Long v. Smith Food King Store, 531 P.2d 360, 362 (Utah 1973). Because there were no facts presented, nor any basis from which a fair inference could be drawn that the wind blown mat is a permanent condition, we cannot

agree with Durborow's contention that the trial court improperly applied the law.

Because we agree with the trial court's determination that a wind blown mat is a temporary condition we also concur in its determination that appellant has failed to establish the Hospital's liability under that theory. It is undisputed that the Hospital did not have actual notice that the mat had or would flip in the wind. Furthermore, appellant has offered no evidence to show that the Hospital had constructive notice of this condition.

2. Rule 11

Appellant asserts that she is entitled to attorney fees and costs under Rule 11 because the Hospital's arguments are not warranted by the existing law. See Utah R. Civ. P. 11. When reviewing a trial court's Rule 11 determination, we review the trial court's conclusion under a correction of error standard. See Barnard v. Sutliff, 846 P.2d 1229, 1235 (Utah 1992). In determining whether conduct violates Rule 11, the court must focus on whether the alleged violater's research into the law and facts surrounding a filing is "objectively reasonable under all circumstances." Id. at 1236. After reviewing the record, we have determined that the trial court's conclusion that the Hospital did not violate Rule 11 is correct. The Hospital's claim that appellant's accident was the result of an "Act of God" was not objectively unreasonable nor meritless under the circumstances. Furthermore, the Hospital's argument that this case should be analyzed as a temporary condition is warranted by the law. Therefore, we affirm the trial court's conclusion that the Hospital did not violate Rule 11.

Affirmed.

Michael J. Wilkins,
Associate Presiding Judge

WE CONCUR:

James Z. Davis,
Presiding Judge

Pamela T. Greenwood, Judge

I, the undersigned, Clerk of the Utah Court of Appeals, do hereby certify that the foregoing is a full, true and correct copy of the original document on file in the Utah Court of Appeals testimony whereof, I have set my hand and affixed the seal of the Court

Julia D'Alessandro
Clerk of the Court

Deputy Clerk

Date

IN THE UTAH COURT OF APPEALS

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Catherine L. Durborow, Plaintiff and Appellant, v. IHC Hospital, Inc.; and Cottonwood Hospital Medical Center, Defendants and Appellees.	ORDER Case No. 971309-CA

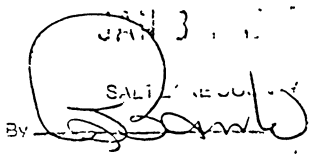
This matter is before the court upon appellant's petition for rehearing, filed October 15, 1998.

IT IS HEREBY ORDERED that the petition for rehearing is denied.

Dated this 27 day of October, 1998.

FOR THE COURT:

Michael J. Wilkins,
Associate Presiding Judge



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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

CATHERINE L. DURBOROW, Plaintiff, vs. IHC HOSPITALS, INC , COTTONWOOD HOSPITAL MEDICAL CENTER Defendant.	:	ORDER Civil No. 950905016PI Judge Glenn K Iwasaki

This matter has came before the court on the Motion for Summary Judgment of defendant Cottonwood Hospital Medical Center. Defendant submitted memoranda in support of the Motion and Plaintiff submitted memoranda opposing the Motion. In connection with her opposition, plaintiff also filed a Counter Motion for Partial Summary Judgment. A hearing on the Motion for Summary Judgment was held September 23, 1996, with Samuel King and

David J. Friel appearing on behalf of the plaintiff and David J. Hardy appearing on behalf of defendant. At that hearing, plaintiff withdrew her Counter Motion.

Following the court's ruling in favor of defendant on the Motion for Summary Judgment, plaintiff filed a Motion to Set Aside Summary Judgment and to Grant Her Motions. Plaintiff and defendant filed memoranda in support of and opposing the Motion. A hearing on this Motion was held on January 10, 1997, with Samuel King and David J. Friel appearing on behalf of plaintiff and David J. Hardy on behalf of defendant.

For purposes of this motion, the court has resolved doubts concerning questions of fact in favor of plaintiff and has therefore assumed that plaintiff was injured when a mat on defendant's property flipped in the wind and caused her to fall. The court further assumes that the mat flipping in the wind was an unsafe condition.

Based on the record presented, the court finds as follows:

1. The instrument causing plaintiff to fall, a mat flipping in the wind, was a condition of a temporary nature arising from the weather,

2. There is no dispute of fact as to whether defendant had notice that the mat had or would flip in the wind, as all of the evidence presented to the court shows that defendant had no notice that the mat had ever previously flipped in the wind;

3. The evidence as to the age of the mat, testing performed at the time the mat was purchased, and the regular inspections of the premises conducted by defendant, shows, without dispute, that defendant did not have constructive knowledge that the mat had or would flip in the wind and create an unsafe condition.

WHEREFORE, based on the findings set forth herein and other good cause shown, the Motion for Summary Judgment is granted, Plaintiff's Motion to Set Aside Summary Judgment and Grant Her Motions is denied, and Plaintiff's request for an award of attorney fees is denied.

IT IS HEREBY ORDERED that plaintiff's claims against IHC Health Services, Inc. (formerly IHC Hospitals, Inc.) and Cottonwood Hospital Medical Center are dismissed with prejudice.

DATED this 31st day of January, 1997.

BY THE COURT:

Glenn K. Iwasaki, District Judge

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * *

CATHERINE L. DURBOROW,	:	Civil No. 950905O1PI
Plaintiff,	:	
	:	PARTIAL TRANSCRIPT OF
vs.	:	HEARING BEFORE
	:	Judge Glenn Iwasaki
IHC HOSPITALS INC., COTTONWOOD HOSPITAL MEDICAL CENTER,	:	
Defendant(s).	:	

* * *

Partial transcript of hearing before Judge Glenn Iwasaki at 240 East 400 South, Salt Lake City, Utah, on the 23rd day of September, 1996, at the hour of 11:00 a.m. Transcribed from videotape by Scott M. Knight, a Registered Professional Reporter, Utah License No. 92-110171-7801, and Notary Public in and for the State of Utah.

PROCEEDINGS

THE COURT: This is a case in which it comes down to whether or not I determine with confidence as to whether this was a temporary or a permanent condition. And I think the analysis is something more than just the use of -- just the employment of a rug outside of the entrance.

The dangerous condition in this matter was not the rug per se, but it was a rug that would be susceptible to high gusts -- to gusts of wind, however that is determined, and there's a conflict there -- to gusts of wind that happened, lift it and flap it in the wind, thus causing someone to fall upon it.

The Court is of the opinion that this fall is within the temporary category rather than the permanent category. And I reference that as to the descriptions given in the Schnuphase case, vs. Allen, that this is a temporary condition in that the -- the use of the carpeting was for the safety of ingress and egress, to keep a dry area that people can go in and out of the hospital. The condition was of a temporary one in that the wind situation did not permanently create it, but created it only as to the gusts that were strong enough to move it.

The Court is aware of Mr. King's argument in

that they chose to put it that way; however, at the time the decision was made to use the carpeting, there was affidavits in this case that indicated that a -- certain tests were used to show that the carpet would not be moved in a strong wind. And, in fact, there was affidavits that indicated that a blower was used and it did not change it.

The affidavit subsequent to the injury -- I don't contest the contents -- indicated that it was not of the same condition as it was when it was purchased; however, there was a warranty to some extent, of which you could -- reasonably could rely upon it in that the carpeting was good for ten years. But it wasn't, in my recollection of the facts, any qualifications as to ten years being indoor or outdoor. It was ten years. And I stand corrected if that's the case.

But regardless of which, it was an indoor/outdoor carpeting, which has been -- which has been conceded more or less. And the use of that carpeting did not exceed even two -- well, about two-thirds of the life of -- even on an eight-year aspect of it, or at least 75 percent of it, on an eight-year aspect of it; therefore, it's presumed, then, for reasonable people to assume that still -- that it was still wear-worthy at that time.

I also have to balance who bears the risk of this matter. And that's the hardest question I have to face. If there was any indication that Cottonwood Hospital had any inkling or notification whatsoever as to the condition of this carpeting in a wind, there's no question in my mind that a motion for summary judgment would be denied, and denied emphatically.

However, it appears uncontested that prior to the unfortunate incident in this case here, there was absolutely no notice at all and no indication that defendants were put on any notice that that condition was dangerous as to the condition which caused the fall in this matter, i.e., dangerous as to its flapping in a wind gust, thus causing the plaintiff, or any other person, to fall as a result of that flapping.

Therefore, the finding of the Court is that this was a temporary condition; that being a temporary condition, that prior notice must be given and shown. The plaintiff has the burden of doing that. That is absent in the record, as far as I'm concerned; therefore, motion for summary judgment is granted on behalf of defendant IHC Hospital.

Both sides of that (Inaudible) or sanctions in this matter. Both sides a request for fees and/or sanctions are denied. I find that there was a

Appeals or which are cases of first impression under state or federal law which will have wide applicability.
(Amended effective November 1, 1996.)

Amendment Notes. — The 1996 amendment deleted circuit courts from the list of courts in Subdivision (c)(2).

Compiler's Notes. — The Advisory Committee Note to Rule 42 also applies to this rule.

NOTES TO DECISIONS

Cited in State v. Anderson, 910 P.2d 1229 (Utah 1996); State v. Gordon, 913 P.2d 350 (Utah 1996); State ex rel. Utah State Dep't of Social Servs. v. Sucec, 924 P.2d 882 (Utah 1996).

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law — The Utah Court of Appeals, 1988 Utah L. Rev. 150.

Rule 44. Transfer of improperly pursued appeals.

If a notice of appeal or a petition for review is filed in a timely manner but is pursued in an appellate court that does not have jurisdiction in the case, the appellate court, either on its own motion [or] on motion of any party, shall transfer the case, including the record on appeal, all motions and other orders, and a copy of the docket entries, to the court with appellate jurisdiction in the case. The clerk of the transferring court shall give notice to all parties and to the clerk of the trial court of the order transferring the case. The time for filing all papers in a transferred case shall be calculated according to the time schedule of the receiving court.

Advisory Committee Note. — Rule 4C is renumbered as Rule 44. It is amended to permit the transfer of an appeal that is timely but improperly filed not only between the Supreme Court and Court of Appeals but also to the District Court. Under the Administrative Procedures Act, the District Court has jurisdiction to review informal adjudicative proceedings of administrative agencies. The Supreme Court and Court of Appeals have jurisdiction over the review of formal adjudicative proceedings. Provided that all parties have notice of the intent to seek judicial review, the same policy considerations that permit the transfer of an improperly filed appeal between the Supreme Court and the Court of Appeals should permit the transfer of such a case to the District Court.

NOTES TO DECISIONS

Cited in Alumbaugh v. White, 800 P.2d 825 (Utah Ct. App. 1990); State v. Garcia, 805 P.2d 199 (Utah Ct. App. 1991); Padilla v. Utah Bd. of Pardons, 820 P.2d 473 (Utah 1991).

TITLE VII. JURISDICTION ON WRIT OF CERTIORARI TO COURT OF APPEALS

Rule 45. Review of judgments, orders, and decrees of court of appeals.

Unless otherwise provided by law, the review of a judgment, an order, and a decree (herein referred to as "decisions") of the Court of Appeals shall be initiated by a petition for a writ of certiorari to the Supreme Court of Utah.

Rule 46. Considerations governing review of certiorari.

(a) Review by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for special and important reasons. The following, while neither controlling nor wholly measuring the Supreme Court's discretion, indicate the character of reasons that will be considered:

(1) When a panel of the Court of Appeals has rendered a decision in conflict with a decision of another panel of the Court of Appeals on the same issue of law;

(2) When a panel of the Court of Appeals has decided a question of state or federal law in a way that is in conflict with a decision of the Supreme Court;

(3) When a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court's power of supervision; or

(4) When the Court of Appeals has decided an important question of municipal, state, or federal law which has not been, but should be, settled by the Supreme Court.

(b) After a petition for certiorari has been filed, the panel that issued the opinion of the Court of Appeals may issue a minute entry recommending that the Supreme Court grant the petition. Parties shall not request such a recommendation by motion or otherwise.

(Amended effective October 1, 1992; July 1, 1994.)

Amendment Notes. — The 1994 amendment added the Subdivision (a) designation, redesignating former Subdivisions (a) to (d) as (a)(1) to (4), and added Subdivision (b).

NOTES TO DECISIONS

Cited in Butterfield v. Okubo, 831 P.2d 97 (Utah 1992).

Rule 47. Certification and transmission of record; joint and separate petitions; cross-petitions; parties.

(a) *Joint and separate petitions; cross-petitions.* Parties interested jointly, severally, or otherwise in a decision may join in a petition for a writ of certiorari; any one or more of them may petition separately; or any two or more of them may join in a petition. When two or more cases are sought to be reviewed on certiorari and involve identical or closely related questions, it will suffice to file a single petition for a writ of certiorari covering all the cases. A cross-petition for writ of certiorari shall not be joined with any other filing.

(b) *Parties.* All parties to the proceeding in the Court of Appeals shall be deemed parties in the Supreme Court, unless the petitioner notifies the Clerk of the Supreme Court in writing of the petitioner's belief that one or more of the parties below have no interest in the outcome of the petition. A copy of such notice shall be served on all parties to the proceeding below, and a party noted as no longer interested may remain a party by notifying the clerk, with service on the other parties, that the party has an interest in the petition.

(c) *Motion for certification and transmission of record.* A party intending to file a petition for certiorari, prior to filing the petition or at any time prior to action by the Supreme Court on the petition, may file a motion for an order to have the Clerk of the Court of Appeals or the clerk of the trial court certify the record, or any part of it, and provide for its transmission to the Supreme Court. Motions to certify the record prior to action on the petition by the Supreme Court should rarely be made, only when the record is essential to the Supreme Court's proper understanding of the petition or the brief in opposition and such understanding cannot be derived from the contents of the petition or the brief in opposition, including the appendix. If a motion is appropriate, it shall be made to the Supreme Court after the filing of a petition but prior to action by the Supreme Court on the petition. In the case of a stay of execution of a